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Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~[illegible]~~ 75

CARLIN CONSTANTINE VENUS, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue in this case to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California convicting the petitioner for a violation of the Universal Military Training and Service Act.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed, *infra*, pages 21 to 35, as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 24, 1960. See Appendix B, *infra*, page 36. A petition for rehearing was timely filed in the court below and it was denied on February 2, 1961. See Appendix C, *infra*, page 37. An application for extension of time was duly made. On February 23, 1961, the time for filing this petition was extended to April 3, 1961, by an order made by Mr. Justice Douglas. See Appendix D, *infra*, page 38.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P. Title 18, Section 3231, U. S. C. confers jurisdiction on the trial court.

QUESTIONS PRESENTED

I.

Whether the conviction based on an indictment that under the court's charge limited the offense (of failing to keep petitioner's local board informed as to where mail would reach him) to the month of February, 1955, should have been reversed because the draft board record showed that during such time mail would have reached him at either Modesto, California, or San Diego, California.

II.

Whether the conviction based on an indictment that under the court's charge limited the offense (of failing to keep petitioner's local board informed as to where mail would reach him) to the month of February, 1955, should have been reversed because the draft board record showed there was on file a letter written in June of 1954 that in-

formed the local board not only of the Modesto address but also of petitioner's permanent San Diego address, where mail would always reach him.

III.

Whether the conviction should have been reversed because the motion to dismiss the indictment was improperly overruled by the trial court since petitioner was denied rights of a speedy trial guaranteed by the Sixth Amendment to the United States Constitution by the Government through deliberate and extraordinarily long delay in bringing the last count of the second indictment accusing petitioner with failing to keep the local board advised of an address where mail would reach him following one appeal and three trials of the original indictment charging petitioner with failure to report for induction, which first indictment was dismissed by the trial court on the last trial.

IV.

Whether the trial court committed reversible error in refusing to give petitioner's requested instructions numbers 45 and 46, which put to the jury petitioner's theory concerning the mailing of the card at Los Angeles in February, 1955, notifying the local board of his return from Modesto to San Diego.

STATUTE INVOLVED

Section 12(a) of the Universal Military Training and Service Act (50 U. S. C. App. § 462(a)) provides:

> "• • • Any • • • person • • • who • • • refuses • • • service in the armed forces • • • or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title • • • shall upon conviction in any district court of the United States of competent juris-

diction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. * * *"

REGULATIONS INVOLVED

Section 1602.4 of the Selective Service Regulations (32 C.F.R. § 1602.4) reads as follows:

> *"Delinquent.*—A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law."

Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3) reads as follows:

> *"Communication by Mail.*—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

Section 1642.1 of the Selective Service Regulations (32 C.F.R. § 1642.1) reads as follows:

> *"Regulations Governing Delinquents.*—Delinquents, as defined in section 1602.4 of this chapter shall be governed by the provisions of this part and such other provisions of the Selective Service Regulations as are not in conflict therewith."

Section 1642.2 of the Selective Service Regulations (32 C.F.R. § 1642.2) reads as follows:

> *"Continuing Duty.*—When it becomes the duty of a registrant or other person to perform an act or furnish

information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty."

STATEMENT OF THE CASE

Petitioner seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit, affirming a judgment of the United States District Court for the Southern District of California. (See Appendix B, *infra*, at page 36.) The judgment of the district court was entered after trial by jury finding petitioner guilty of failing to keep the local board advised as to where mail would reach him, in violation of the Universal Military Training and Service Act.[1]

This case has a long history. (See *Venus* v. *United States*, 266 F. 2d 386 (9th Cir. 1959).) Petitioner was charged by indictment on August 8, 1957, with only one offense, that of failing to report for induction on November 8, 1955, at San Diego, California. (TR 2; SM 40-42) He pleaded not guilty to this indictment and during November, 1957, he was convicted of that offense and appealed to the Court of Appeals. The Court of Appeals reversed the conviction because of errors committed by the trial court in charging the jury and in refusing to grant certain requested instructions upon the law and the facts.—266 F. 2d 386 (Jan. 8, 1959).

Following the reversal of the conviction the original

[1] There is no printed record in this case because of the speed of submission demanded by the Court of Appeals. Time was not allowed to print the record. Pursuant to the rules of the court below the case was ordered submitted on typewritten record and typewritten briefs. Numbers appearing herein within parentheses and preceded by "TR" refer to pages of Transcript of Record. Numbers appearing herein within parentheses and preceded by "SM" refer to pages of the official Reporter's Transcript of Proceedings.

indictment was tried twice to a jury, resulting on each occasion in a mistrial because of a hung jury.

The Government, as an afterthought following the third trial, procured a second indictment containing two counts on December 23, 1959. The first count of this new indictment charged petitioner with the offense of failing to perform a continuing duty to report for induction in April of 1956. The second count charged petitioner with the offense of failing on or about February 1, 1955, to keep his local board notified of an address "where mail" would reach him at all times. (TR 4; SM 41-43) He was not indicted with failing to perform a continuing duty after February, 1955. The commission of the offense was limited to "on or about" February 1, 1955. See pages 29-30, *infra*.

Petitioner duly filed a motion to dismiss the second indictment because of the long delay of the Government in bringing the two counts of the second indictment so as to deny his right to a speedy trial guaranteed by the Constitution. (TR 7-21; SM 13-17)

The case (two indictments containing one and two counts respectively) proceeded to trial before a jury on May 5, 1960. (SM 3) The evidence was concluded on May 10, 1960. Petitioner made an extensive motion for judgment of acquittal at the close of all the evidence. (SM 440-449) The trial court denied the motion for judgment of acquittal. (SM 449) The case was then argued to the jury on May 11, 1960. The charge to the jury by the court began on May 11 and was concluded on May 12, 1960. The jury was kept by the court to deliberate for three days and finally reached a verdict late on Saturday afternoon, May 14, 1960. (TR 171)

The verdict rendered by the jury found petitioner guilty on only one count, the last count of the second indictment. The jury reported that it was unable to agree on the first indictment and on count one of the second indictment. (SM 572) The trial court discharged the jury as to the first indictment and the first count of the second indictment. (SM 573)

Petitioner renewed his motion for judgment of acquittal promptly after the verdict on count two of the second indictment. (SM 576-577) The trial court, over the objection of the district attorney, dismissed the first indictment and the first count of the second indictment on its own motion "in the interests of justice, on the ground that there have been now four trials." (SM 578) The trial court then overruled the motion for judgment of acquittal as to the second count of the second indictment and held that there was some evidence to support the jury's verdict on the last count of the second indictment. (SM 579-582)

Petitioner was sentenced to the custody of the Attorney General for a period of three years and ordered to pay a fine in the amount of $500. (TR 196; SM 592-593) He duly appealed to the Court of Appeals, which affirmed the conviction, as above shown.

The draft board file of petitioner (except for certain excluded parts) was received into evidence as Government's Exhibit 1. (SM 112, 131) Such file is contained in three cover sheets, which, on the outside, show the many notifications of changes of address by petitioner. (SM 132-140) The three different cover sheets were used by the local board as the basis of addressing cards and letters to the petitioner. (SM 138-139)

Entries on the cover sheet (part of Government's Exhibit 1) under "CHANGES OF ADDRESS:" are numbered, and they were based upon communications received from the petitioner by the board, indicating various changes of address as to where mail would reach him. The cover sheet appearing in Government's Exhibit 1 shows that petitioner notified the local board of six separate changes of address before October, 1955, when the order commanding him to report for induction issued. The local board received and made entries on the cover sheet of the six letters or cards received by it showing changes of address.

Entry number 6 of a change of address that was recorded by the local board on the cover sheet shows a letter

was received from petitioner dated June 7, 1954. Such letter appearing in the file reads as follows:

"At this time I wish to inform you of my departure from San Diego to Modesto, California, because of secular employment. The Federal Bureau of Investigation I have notified when in Los Angeles after induction procedures. My new address is (Same employer) 1431 Tenth Street, Modesto, Calif., *but can be reached within one or two days, at my San Diego address.*" (SM 141, 206)[2]

Upon receipt of this letter by the local board in June of 1954 entry number 6 on the cover sheet under the heading "CHANGES OF ADDRESS:" was made. The entry reads as follows: "1431 - 10th St. 6-7-54, Modesto, Calif. (See letter inside)." (SM 140) The longhand notation "(See letter inside)" for emphasis by the board was written in red on the original cover sheet. (SM 140) The clerk of the local board testified the one and only reason that she made the entry on the outside of the cover sheet opposite item number 6 under the heading "CHANGES OF ADDRESS:" was because, if petitioner could not be reached at the Modesto, California, address, the local board would "look for or try and contact him through his San Diego address." (SM 141)

The clerk of the board said that the board had been notified by petitioner that he had given his parents' San Diego address previously to the order to report and to the letter of June, 1954, as the place where he could always be reached. (SM 142) The clerk testified that Venus was specifically requested, not only to give the address where he lived or resided, but also to give a reference of someone—his parents in this case—who would know his address or through whom mail would reach him. (SM 143)

[2] Emphasis is added to show that the local board never failed to know where petitioner could be reached. Also undisputed evidence shows petitioner was then out on bond pending a trial in Los Angeles of an indictment charging a violation of an earlier order to report for induction.

The clerk testified that the statement appearing in the letter from Venus dated June 7, 1954, "but can be reached within one or two days, at my San Diego address," referred to the address of Venus' parents. This address was written on the outside of the envelope in which the letter came to the board as the *return address* of petitioner. This envelope was attached to the letter dated June 7, 1954, appearing in the file. (SM 143-144) Such envelope showed the return address of Venus as 650 11th Street, San Diego. (SM 144) This is the same address that was recorded on the cover sheet under the heading "CHANGES OF ADDRESS:" and listed as item number 5. See Government's Exhibit 1.

The clerk testified that Venus had furnished the local board with the 650 11th Street, San Diego, address as his parents' address, where he could always be reached long previous to writing the letter of June 7, 1954. (SM 144)

Venus lived at Modesto, California, from June, 1954, to February 7, 1955, on which date he moved to Los Angeles to work at various places in Los Angeles County. (SM 208-209, 234-237, 252, 272, 279-281) On February 1, 1955, the date charged in the indictment, mail admittedly would have reached him at Modesto.

On moving to Los Angeles Venus worked as a tree cutter for one week and afterward he went to San Diego to help his parents move from 650 11th Street to 1120 30th Street, San Diego. He said all his addresses in Los Angeles were temporary. (SM 10, 238, 275, 290) He helped his parents to move his permanent residence from one address to another on a weekend that was in the middle of February. (SM 238, 275)

The father of Venus testified that promptly after making this move of the permanent address of petitioner he—the father—left a forwarding address with the San Diego Post Office, which notified that office that he had moved from 650 11th Street to 1120 30th Street, San Diego, which then was the permanent address of petitioner.

Venus returned to Los Angeles after helping his parents move and resumed his work as a tree cutter. (SM 209) Thereafter he had many temporary Los Angeles addresses. (SM 210, 218, 256)

On or about February 19, 1955, after his return from San Diego, petitioner deposited a government post card in the United States Post Office at Los Angeles addressed to his local board, which was several months before the order to report was mailed, as appears below. (SM 210-213, 219) He testified that this card was mailed, as above stated, after he had helped his parents move to 1120 30th Street, San Diego. (SM 213-216) He also testified that the card notified the board of the 1120 30th Street address in San Diego. (SM 255, 261, 276-277)

In the same mail, according to undisputed testimony, Venus deposited a letter properly stamped and addressed to Bertha Leonard in San Diego that enclosed a postal money order that was received by her in due course of the mails. (SM 255, 261, 276-277, 279-281)

Long after Venus had moved from Modesto and notified his board that he had changed his address back to San Diego it prepared and mailed to him at the Modesto address an order to report for induction dated October 28, 1955, commanding him to report for induction at San Diego in November, 1955. (SM 119-120) The order was placed in an envelope addressed to 1431 10th Street, Modesto, California, and not to the permanent San Diego address shown in the communication of June, 1954, to the board. (SM 120-122) One of the three cover sheets showing the 1431 10th Street, Modesto, California, address was used in the preparation of the order and the envelope in which it was mailed. (SM 132-133) It was obviously one of the several cover sheets that failed to show the words: "See letter inside" that identified the San Diego address.

The order to report for induction was never received by Venus at his San Diego address. There may have been several reasons. One: the building at the Modesto address

where he lived and worked was torn down in April of 1955 and thereafter no longer existed and did not exist in October of 1955. Two: Venus had not left a forwarding address from the Modesto address back to his San Diego address at the post office in Modesto. (SM 219, 253, 283) The reason for this omission was that petitioner assumed the local board had received the card showing a change of address that he mailed to the local board from Los Angeles in February of 1955, the same as it had received five other such notices and, because of this belief, did not leave a forwarding address with the post office in Modesto, especially since he had notified the board in June of 1954 of the address of his parents in San Diego as a place where mail would always reach him. (SM 253, 255, 261)

Venus testified, however, that had mail been received by his former employer, Morrisson, in Modesto he would have forwarded it to Venus at San Diego at any time through the month of April, 1955. (SM 252-254) Even after Venus left Modesto there was mail from the United States Marshal pertaining to his court appearances in Los Angeles which was received by him through his parents' San Diego address when addressed to it as he had notified the board to do but which it did not do. (SM 264-266)

The local board admittedly never attempted to locate Venus at the San Diego address because the draft board mail that had been sent to him at the Modesto, California, address had never been returned to the local board by the post office. (SM 144-145, 151, 162-163, 164-165)

In February of 1955 when the card was mailed by Venus to the local board notifying it of the change of address, admittedly the draft board file was out of the possession of the board in San Diego. Is had been admittedy for months in the hands of Selective Service officials in Los Angeles so that it could be used in connection with a proposed trial of Venus for an earlier refusal to comply with an order of the local board issued in 1954. (SM 174) The card mailed by Venus in February of 1955 notifying the board of a change

of address was not placed in the draft board file and may have been misfiled because of the absence of the file and the use of the dummy files by the clerk of the local board if it were received. This statement is based on the testimony of the clerk who testified she did not remember receiving the change of address card only because it could not be found in the file. She had no recollection independent of this failure to find the card. (SM 174-186)

The clerk testified also that Venus had always been very prompt and regular in notifying the local board about any communication from the board or about any change in address. (SM 165) She testified the board had been informed that Venus' parents would at all times know his address and know how to locate him. (SM 163)

Venus did not learn of the existence of the October, 1955, order to report for induction until April, 1956, when he was interviewed by an F.B.I. agent. (SM 220, 222, 224) He wrote the local board after the interview with the F.B.I. agent, who failed to advise what to do except for Venus to write the board, which he did, but he received no answer to his letter to the board as to what to do. (SM 226) The local board then made a notation, however, of his new address at 756 Pier Avenue, Santa Monica, California, on April 10, 1956, and later, on November 15, 1956, noted another change of address to 302 Market Street, Venice, California. All of these many notices, seven or eight in all, were long before the indictment charging Venus with a failure to keep the local board informed of a place where mail would always reach him during February, 1955, which time was a mere short interval between many notices and was also eight months before the board mailed the order to report in the latter part of October of 1955. See the cover sheets, Government's Exhibit 1.

For a briefer statement of the facts see the dissenting opinion of Judge Jertberg, at pages 33 to 35. Compare the statement in the opinion of the majority of the court below at pages 26 to 28.

REASONS FOR GRANTING THE WRIT

I.

The court below held that no error was committed by the trial court in overruling the motion for judgment of acquittal. The undisputed evidence showed that petitioner did not willfully and knowingly fail to keep his local board advised at all times of the place where mail would reach him. The evidence wholly failed to show any willful and knowing violation of the law. The evidence was as consistent with innocence as it was with guilt. The draft board file showed two addresses where mail could reasonably be expected to reach petitioner at all times during the month of February, 1955.

The holding of the court below upon the record in this case is out of harmony with and diametrically opposed to *Ward* v. *United States*, 344 U. S. 924 (1953) (reversing *Ward* v. *United States*, 195 F. 2d 441). The petitioner in this case did identically what Ward did. (1) Ward gave the address of his employer as well as his residence address. In this case Venus gave the address of his employer in Modesto as well as the address of his parents, at which the record and the undisputed testimony of the clerk of the local board show was his permanent address through which mail would always reach him within two days. (2) In the *Ward* case the board did not attempt to use the business address but used only the residence address from which Ward moved without notifying the board. In this case the board used the Modesto address of Venus' employer from which petitioner had moved months before the order was mailed without notifying the board. (3) In this case the board made no effort to reach petitioner through his parents' address, which was his permanent address, but attempted to reach him only through his employer's address in Modesto. The facts in the two cases are identical in effect. (4) In *Ward* v. *United States* (344 U. S. 924) Ward gave two address to the local board and the local board used

only one, from which Ward had moved, and made no attempt to use the other. In this case Venus gave the board two addresses, one of which he had moved from, and the board admittedly made no attempt to use the other address.

It is manifest, therefore, that the distinction that the court below has drawn between *Ward* v. *United States* (344 U. S. 924) and the facts in this case is groundless and wholly without justification. So how can the court below under any circumstances make a distinction between this case and *Ward* v. *United States* (344 U. S. 924)? Instead of Venus misplacing reliance upon *Ward* v. *United States* (344 U. S. 924) the court below has made a distinction without a difference.

The court below has also misinterpreted *Bartchy* v. *United States,* 319 U. S. 484 (1943). The court below made such distinction because the two majority judges of the court below believed that the jury could not reasonably expect mail to come into Venus' hands in time for compliance; so he was guilty. Hindsight is better than foresight!

The court below should not have looked at this case from that viewpoint. The case should be viewed from the standpoint of Venus in February, 1955. If he could reasonably have expected during the month of February, 1955, that mail would reach him in time for compliance at either one of the addresses given in the letter of June, 1954, then the petitioner is not guilty as a matter of law. It was error for the court below to conclude, in the face of the record in this case, that Venus could not reasonably expect mail to come into his hands at either one of the addresses given in the letter of June, 1954, during the month of February, 1955.

The month of February, 1955, is the crucial month. The trial court limited the indictment to that month. What happened before February is irrelevant and immaterial. What happened after February, 1955, is also irrelevant and immaterial under the ruling of the trial court, which

the court below approved. (See the opinion at pages 29 and 30, *infra.*)

In *Bartchy* v. *United States,* 319 U. S. 484 (1943), the Court said that a registrant had performed his duties under Section 1641.3 of the regulations when he had, in good faith, provided a chain of forwarding addresses by which mail "sent to the address which is furnished the Board, may be by the registrant reasonably expected to come into his hands in time for compliance." The court below fails to point out a single shred of evidence by which any reasoning person could come to the conclusion that Venus could not reasonably expect in February of 1955 that mail would reach him at either the Modesto address or at 650 11th Street, San Diego, California. This is admittedly so during the period of time from February 1 to February 21, 1955, the latter date being the day Venus helped his parents move. It should also be held so for the succeeding seven days.

One of the most striking pieces of evidence in the draft board file that points out that Venus could reasonably have expected to receive mail from the board at 650 11th Street, San Diego, California, is that on May 4, 1954, as shown in the registrant's file, an order to report for induction was mailed to the registrant at 650 11th Street, San Diego, California, and he received it through his parents. Since he had received this prior order to report when it was sent through his parents, it is stretching the imagination of man too far to come to the conclusion that he could not reasonably have expected in February, 1955, to receive mail at this address in time for compliance with any orders contained in such mail sent during February.

The court below (page 30, *infra*) states: "We might assume, although there is no proof of the fact, that mail directed to appellant by the local draft board during the early days of February to the Modesto address would have reached him. We cannot assume that mail directed by the local Board during the month of February, but after the

early date thereof, to the appellant at the Modesto address would have reached him."

During the first three weeks of February—up to February 21—Venus' parents were still living at the 650 11th Street address in San Diego. This was also the home of Venus and his permanent address. Thus the undisputed evidence leads the minds of reasonable men to only one conclusion, which is that had any correspondence been directed to the petitioner at either the Modesto address or his parents' address in San Diego, such correspondence could reasonably have been expected by Venus during this time to have come into his hands in time for compliance. Any conclusion other than this is based on mere speculation, as is so forthrightly pointed out in the dissenting opinion (page 35, *infra*) to which this Court is referred.

In the face of the undisputed evidence in this case showing that Venus could reasonably expect that mail would reach him during the first three weeks of February at either one of the two addresses given the board in the letter of June, 1954,—February 1 and February 21, 1955—then the sole basis for the conclusion of the court below that the petitioner is guilty is that there is no official notice of a change of address in the draft board file covering the last seven days of February. It is unjust and unreasonable in these circumstances to affirm the conviction of Venus for a violation of the Act and regulation solely because he did not act immediately after February 21, 1955, and before February 28, 1955, by writing another letter.

It has therefore been shown that *Bartchy* v. *United States*, 319 U. S. 484 (1943), and *Ward* v. *United States*, 344 U. S. 924 (1953), are applicable and the decision of the court below is in conflict with both. The court below has defied the holding in *Ward* v. *United States*, 344 U. S. 924 (1953), and departed from the ruling in *Bartchy* v. *United States*, 319 U. S. 484 (1943).

This question is manifestly important. There are millions upon millions of registrants involved. They daily

use the mails. They are not educated and trained in the law. They are not to be dealt with as though they were litigants represented by counsel.—*United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3rd Cir. 1953); *United States* v. *Greene*, 220 F. 2d 792, 794 (7th Cir. 1955).

The unfortunate set of circumstances in this case, to say nothing of the miscarriage in the mails that does happen from time to time and not to mention the possible error of the clerks of the local board in misfiling papers in files either in or out of the board at the time mail is received, show that what happened in this case could happen to any registrant regardless of whether he is a conscientious objector. This case lays down such a drastic and severe penalty for registrants using the mails in dealing with draft boards that this Court ought to take prompt action to correct the miscarriage that has occurred, else thousands if not hundreds of thousands of other registrants may find themselves unexpectedly snared and trapped by the sophisticated rule of law laid down by the court below.

Exception is taken to the statement appearing in the last full paragraph of the majority opinion: "• • • no good faith existed on the part of Venus with respect to his continuing duty between June 7, 1954, and early 1956 to inform the board." This is a false conclusion by the Court of Appeals. There was no allegation of continuing duty in the indictment. It was, moreover, impossible for the petitioner to have "no good faith" from June 7, 1954, to February 21, 1955, the time alleged in the indictment, because there was on file with the local board the letter informing the board of Venus' Modesto address and his San Diego address where he could always be reached. The Court of Appeals even goes beyond the limitation of February 21, 1955, placed upon the indictment by the trial court in its charge (see footnote 4 of the opinion, *infra*, page 29) and includes, as the basis for the conviction "early 1956." On what theory in law, in fact or in the stratosphere could there be basis

for the court's statement that Venus did not have good faith from June 7, 1954, to "early 1956"?

It is respectfully submitted that this is a substantial question of law that is of great public importance and that ought to be resolved by this Court even though the Court does not conclude that it has jurisdiction because the holding of the court below is out of harmony with two former decisions of this Court.[3]

II.

The district court committed reversible error in overruling the motion to dismiss the indictment. The motion to dismiss and the record in this case show an extraordinary and deliberately long delay by the Government in bringing the last count of the second indictment.

In the motion to dismiss petitioner stated, among other things, as follows:

> "The offense charged in the indictment is not brought in good faith, but was deliberately delayed by the United States Attorney to within six weeks of the expiration of the five year statute of limitations so as to prejudice the defendant and deny him of his rights to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution, and the reasons therefor shall now be stated."

The motion to dismiss contained other extensive allegations that appear in the typewritten transcript of the record that show that petitioner was prejudiced by the

[3] In the event that this Court grants the writ of certiorari in this case on this ground, then it is respectfully submitted that the case be decided upon the papers and the record and the case be not docketed for oral argument, because it is manifest that the judgment of the court below is erroneous and in direct conflict with *Bartchy* v. *United States*, 319 U. S. 484 (1943), and *Ward* v. *United States*, 344 U. S. 924 (1953). In the last-cited case this Court took the action suggested here in this footnote. See also *United States* v. *Balogh*, 329 U. S. 692 (1947), and *Mathews* v. *West Virginia*, 320 U. S. 707 (1943).

long delay in bringing the prosecution. This is an important question that has not heretofore been determined by this Court but which ought to be decided by it in this case.

The holding of the court below is out of harmony with the dictum of this Court in *Smith* v. *United States*, 360 U. S. 1, 10 (1959), where the Court said: "* * * It is further suggested that it might be in the interests of the defendant to have the benefit of the speed that can be mustered by the filing of an information instead of an indictment. While justice should be administered with dispatch, the essential ingredient is orderly expedition and not mere speed. * * * Moreover, if contrary to sound judicial administration in our federal system, arrest and incarceration are followed by inordinate delay prior to indictment, a defendant may, under appropriate circumstances, invoke the protection of the Sixth Amendment." Compare Rule 48(b) of the Federal Rules of Criminal Procedure.

It is submitted also that the holding of the court below is in conflict with *Pollard* v. *United States*, 352 U. S. 354, 360-362 (1957); *Taylor* v. *United States*, 238 F. 2d 259, 260-261 (D. C. Cir. 1956); *United States* v. *Provoo*, 17 F. R. D. 183, 194-203 (D. Md. 1955), 350 U. S. 857 (1955).

The question involved under this point is of great public importance because of the many thousands of cases that are annually prosecuted under the criminal code of the United States, some of which are inordinately delayed by the Government by waiting until the statute of limitations has almost run out before indictment as in this case.

The action of the court below in approving the deliberate delay of a prosecution by indictment in a case that had been pending several years (and the record showed that the prosecution knew of the violation during the pendency of the first indictment for several years) is a dangerous precedent. The United States Attorney had been notified by the Selective Service System of the violation several years before the indictment was brought. The

United States Attorney concluded that there was no merit to the charge that petitioner failed to keep his local board advised and notified the board that there was reasonable doubt as to the guilt of petitioner on the count. See the letter from the United States Attorney to the draft board dated June 12, 1957, which, although a part of the draft board file, was excluded but which appears as one of the exhibits for identification. See also the entire motion to dismiss the indictment.

The question is therefore of great national importance, and in view of the dictum of the Court in *Smith* v. *United States,* 360 U. S. 1, 10 (1959), and the conflict between the holding of the court below and that of the United States Court of Appeals for the District of Columbia in *Taylor* v. *United States* 238 F. 2d 259, 260-261 (1956), the petition for writ of certiorari should be granted in this case so that the law can be clarified and this important question not be left dangling in the air like a Damocles' sword over the heads of a multitude of persons charged with crime in the federal courts.

It is respectfully submitted that in the event the Court does not decide that there is a conflict between *Taylor* v. *United States,* 238 F. 2d 259, 260-261 (D. C. Cir. 1956), and the decision of the court below, then this Court ought to grant the writ because of the great public importance of the question.

CONCLUSION

WHEREFORE, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON
KENNETH A. BARWICK
Counsel for Petitioner

March, 1961.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARLIN CONSTANTINE VENUS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 16,961
Dec. 24, 1960

On Appeal from the United States District Court for the Southern District of California, Southern Division.

Before: BARNES and JERTBERG, Circuit Judges; and BOLDT, District Judge.

BARNES, Circuit Judge:

Appellant appeals from a judgment of conviction for knowingly failing and neglecting to keep the local draft board advised of the address where mail would reach him at all times. The indictment charged an offense in violation of Title 50 Appendix U.S.C.A. § 462[1]

[1] Title 50 Appendix, U.S.C.A. § 462 provides in relevant part as follows:
"(a) Any * * * person charged as herein provided with the duty of carrying out the provisions of this Title [Sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * shall upon conviction in any District Court of the United States of competent jurisdiction be punished by imprisonment of not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. * * *"

Jurisdiction of the district court was invoked under the provisions of Title 18 U.S.C.A. § 3231 and Title 50 Appendix U.S.C.A. § 462. Jurisdiction of this court to review the appeal from the judgment rests on the provisions of Title 28 U.S.C. §§ 1291 and 1294.

In order to review at least one of the questions presented on this appeal it is necessary to briefly summarize some of the past history of appellant's entanglement with the provisions of the Universal Military Training and Service Act. Appellant registered with the Local Board No. 140 in San Diego County, California, on September 15, 1948. During the years 1950 and 1951 appellant was classified at various times in classifications I-A and III-A. On November 19, 1951, appellant returned to the local board a completed conscientious objector form, in which he claimed that he was, by reason of his religious training and belief, conscientiously opposed to participation in war in any form and claimed exemption from both combatant and noncombatant service. During the years 1952 and 1953 appellant was at various times classified in classifications I-A-O, II-A and I-A. Thereafter appellant remained classified or reclassified I-A, this last classification being on September 1, 1955, following an unsuccessful appeal by the appellant to the appeal board. On September 2, 1955, notice of classification was sent to the appellant at Modesto, California, which appellant claimed he never received. Such claim was advanced by appellant in the prosecution of the first indictment returned against the appellant. On October 28, 1955, the local board ordered appellant to report for induction on November 8, 1955, which order to report was likewise sent to Modesto, California, which was likewise claimed by appellant to have never been received.

Appellant failed to report for induction on November 8, 1955, and on August 8, 1957, appellant was charged by indictment with the offense of failing to report for induction on November 8, 1955, at San Diego, California. Following trial of that offense to a jury, appellant was convicted, and

appealed from the judgment of conviction to this court. The judgment of conviction was reversed by this court in *Venus v. United States*, 9 Cir., 1959, 266 F.2d 386. Following such reversal the offense in the indictment was tried twice to a jury, resulting in each case in a mistrial because of failure to reach a verdict in each case on the part of each jury.

On December 23, 1959, a two-count indictment was returned against the appellant. The first count of this new indictment charged appellant with the offense of failing to perform a continuing duty to report for induction in April 1956. The second count of the new indictment charged that appellant was a person within the class made subject to Selective Service under the Universal Military Training and Service Act; that he registered as required by said Act and the regulations thereunder, and became a registrant of local board No. 140; and that he "thereafter had a duty to keep said board advised at all times of the address where mail would reach him; that on or about February 1, 1955 . . . the defendant, Carlin Constantine Venus, knowingly failed and neglected to perform said duty required of him under said Act and the regulations promulgated thereunder, in that he knowingly failed and neglected to keep said board advised of the address where mail would reach defendant."

The offenses charged in the two indictments—the failure to report for induction on November 8, 1955, alleged in the first indictment returned on August 8, 1957, and the two offenses—the failure to perform a continuing duty to report for induction in April 1956, and the failure to keep the local draft board notified where mail would reach appellant at all times—set forth in the indictment returned on December 23, 1959, were consolidated for trial. The case was tried to a jury in May of 1960. Following deliberations of three days, the jury returned a verdict finding appellant guilty on the second count contained in the second indictment. The jury reported that it was unable to agree on the offense set forth in the first indictment, and on count one of the second indictment. Thereafter the trial court dis-

missed the first indictment and the first count of the second indictment sua sponte "in the interests of justice, on the ground that there had been now four trials." Appellant was committed to custody for three years, and ordered to pay a fine of $500.00.

On December 29, 1959, the appellant moved the district court to dismiss the indictment returned on December 23, 1959, against appellant, on the ground that the delay of appellee in returning the indictment charging appellant with failure to keep the local draft board advised at all times of an address where mail would reach him deprived appellant of his right to a speedy trial, as guaranteed by the Sixth Amendment to the Constitution of the United States. This motion was denied by the district court.

One of appellant's specifications of error on this appeal is that the district court committed reversible error in so doing. We will consider this assignment of error before proceeding to the other points involved in the review of this appeal.

The indictment returned against appellant on December 23, 1959, alleged that the offense set forth in the second count was committed on or about February 1, 1955. Hence the indictment was returned within the five-year period of limitations specified by Title 18 U.S.C.A. § 3282.[2] Trial on this offense commenced on May 5, 1960, and was concluded May 14, 1960, which was less than five months from the date of the return of the indictment.

Appellant concedes "there are a large number of cases that hold that a prosecution is not barred by the statute of limitations so long as it is brought within the five-year statutory period. The courts have held that limitation does not apply even if the indictment is delayed to near the end of the five-year period." (Appellant's Opening Brief, p. 54.)

[2] "§3282. Offenses not capital. Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. As amended Sept. 1, 1954, c. 1214, § 10(a), 68 Stat. 1145."

Mindful of the above stated concession, appellant contends that the delay of appellee in causing appellant to be indicted was violative of the speedy trial provisions of the United States Constitution. No claim is advanced by appellant that he was arrested, detained or held in custody on the offense charged in count two of the indictment prior to the return of the indictment. In short, appellant's argument is that he should have been sooner indicted. We find no merit in this contention. As stated in *Parker v. United States*, 6 Cir., 1958, 252 F.2d 681, *cert. denied* 356 U.S. 963:

> "The provisions of the Sixth Amendment guaranteeing a speedy trial to anyone charged with an offense, contemplate a pending charge and not the mere possibility of a criminal charge."

See also *D'Aquino v. United States*, 9 Cir., 1951, 192 F.2d 338, *rehearing denied* 203 F.2d 390, *cert. denied* 345 U.S. 935 (1952), in which this court stated, at page 350:

> "Appellant, however, says that her military detention in Japan in the year following October 1945, demonstrates that she was denied a speedy trial. We shall have occasion to refer to the character of the detention later in this opinion, but wholly apart from whether that detention was or was not in accordance with law, it has no bearing whatever upon the question of her right to a speedy trial, which is one that arises after a formal complaint is lodged against the defendant in a criminal case."

Appellant's reliance on *United States v. Provoo*, D.Md. 1955, 17 F.R.D. 183, *affirmed* 350 U.S. 857 (1955), and *Taylor v. United States*, D.C.Cir., 1956, 238 F.2d 259, is completely misplaced. In the *Provoo* case the defendant was arrested on a formal charge in September 1949, but was not indicted in the proper district until October of 1954. In the *Taylor* case the indictment was returned on February 23, 1954, and trial did not commence until March 28, 1956.

It clearly appears in the *Taylor* case that the defendant in no manner waived his right to a speedy trial.

Before proceeding further we will briefly summarize the evidence which was before the jury relevant to the offense for which appellant was convicted.

When appellant registered with his local draft board in San Diego County, he gave as his mailing address 184 National Avenue, Chula Vista, California. The clerk of the local board testified that at some time prior to June 7, 1954, appellant gave as an address where he could always be reached the address of his parents, which was 650 Eleventh Street, San Diego, California. On July 14, 1950, notice of classification was mailed to appellant at the address at 184 National Avenue, Chula Vista, California, but was returned to the local board marked "Moved, left no address." Between that date and June 7, 1954, appellant notified the local board of change of address on five separate occasions, the last change of address prior to June 1954 being 650 Eleventh Street, San Diego, California. On June 7, 1954, appellant filed with the local draft board a letter in which he stated: "At this time I wish to inform you of my departure from San Diego to Modesto, Calif. because of secular employment. The Federal Bureau of Investigation I have notified, when in Los Angeles after induction procedures. My new address is (Same employer) 1431 10th St. Modesto, California, but can be reached within one or two days, at my San Diego address." The return address given on the envelope enclosing the letter was 650 Eleventh Street, San Diego. The letter with envelope attached is in the draft board files. The draft board file of appellant is contained within three cover sheets which on the outside show the many notifications of changes of address by appellant. One of these cover sheets, following the listing of the Modesto address, contains the notation in red pencil "(see letter attached)". The other two cover sheets contain no such notation. The explanation given by the clerk of the board for the presence of three cover sheets was that new cover sheets are used when the old cov-

er sheets become "dog-eared." Appellant lived at Modesto, California, from June 7, 1954, to February 7, 1955, on which date he moved to Los Angeles County. No changes of addresses were received by the local board from the appellant for the period from June 7, 1954, to the end of 1955. Following appellant's return to Los Angeles County from Modesto, he moved from one address to another on five or six occasions but did not notify the local draft board of any of said addresses because said addresses were temporary. Appellant testified that in the middle of February 1955, his parents moved from 650 Eleventh Street to 1120 Thirtieth Street, San Diego. Appellant's father testified that he left a forwarding address with the San Diego Post Office, but appellant did not file any forwarding address with the Post Office in this instance. Appellant testified that on or about February 19, 1955, he deposited a government post card in the United States Post Office at Los Angeles, addressed to his local board, notifying the board that his address had been changed to 1120 Thirtieth Street, San Diego, California. Appellant's draft board file does not reveal the receipt of this card by the draft board. It appears from the record that in February 1955, and for some months prior thereto, the Selective Service file of appellant was out of the possession of the local board and in the hands of the Selective Service officials in Los Angeles. A dummy file was used by the clerk of the local board during this period. The clerk of the local board testified that if the card had been received it would have been placed in appellant's file. On September 2, 1955, there was mailed to the appellant by the local board notification of his I-A classification, addressed to 1431 Tenth Street, Modesto, California. On October 28, 1955, the local draft board mailed to appellant at the Modesto address an order dated October 28, 1955, to report for induction at San Diego on November 8, 1955. The envelopes containing the notice of classification and the order to report for induction contained the return address of the local board, but neither letter was ever returned to the local board. The appellant testified that he

never received either the notice of classification or the order for induction. No notices were sent by the draft board to appellant at any other address.

It should be borne in mind that we are not considering any offense charged against the appellant except that on which appellant was convicted, to-wit, that appellant knowingly failed and neglected to keep the local board advised of the address where mail would reach him. Section 1641.3 of the Selective Service Regulations[3] places the duty on each registrant to keep the local board advised at all times of the address where mail will reach him.

The validity of Section 1641.3 of the Regulations was upheld by the Supreme Court of the United States in *Bartchy v. United States,* 319 U.S. 484, in which opinion the following interpretative language appears (at 488):

> "We think the Government correctly interprets the Act, § 11, and the regulation, § 641.3 not to require a registrant who is expecting a notice of induction to remain at one place or to notify the local board of every move or every address, even if the address is temporary. • • • The regulation, it seems to us, is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance."

We will now consider appellant's assigned error "that the district court erred in failing to grant appellant's motion for judgment of acquittal made at the close of all the evidence, and renewed after the verdict of the jury."

[3] Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3) reads as follows:

"Communication by Mail.—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

Under this point, the appellant states:

> "The gist of the argument under this point is—
>
> "(1) The indictment charged appellant with the offense of failing to keep his local board informed as to where mail would reach him on February 1, 1955, and as a matter of fact on such date mail would have reached him at Modesto, California;
>
> "(2) Appellant at all times had in his draft board file a letter written in June of 1954 that informed the local board of an address in San Diego where he could always be reached by mail."

In light of our review of the evidence in this case and the interpretative language in *Bartchy*, we are convinced that the trial court was correct in the denial of the appellant's motion. Section 1641.3 of the Regulations requires a registrant to keep his local board *advised at all times* of the address where mail will reach him. Count two of the second indictment returned against the appellant limited the appellant's duty to "on or about February 1, 1955." During the course of the trial, the district court, in its rulings on the admission of evidence and in its instructions to the jury, held that proof of the offense *at any time during the month of February 1955 would support the charge in the indictment.*[4] It is necessary for us to pass upon the correct-

[4] "Now this indictment alleges that this occurred on or about February 1, 1955. The proof that you heard on that encompasses a period not earlier than February 1, 1955 and running up to February 20th or 21st, 1955, and the Government is making no contention that if Mr. Venus mailed the change of address on February 20th or 21st, whatever the date was he claimed he mailed it, that that was too late. The Government's contention is that he didn't mail it.

"So therefore this count is going to concern solely that simple issue, was that notice mailed sometime in February? It doesn't make any difference when it was mailed in February, if it was mailed. It is just about that simple. The Government doesn't have to prove the exact date. The Government alleges that the defendant did not do this act on or about the 1st of February. But the proof, as I say, encompasses a period that runs on up to the 20th. . . ." (Tr. p. 508.)

* * *

"But you are not concerned with what particular date that card was

ness of such rulings and instructions. We find no error in them.[5]

It is undisputed that appellant remained in Modesto until February 8, 1955. We might assume, although there is no proof of the fact, that mail directed to appellant by the local draft board during *the early days* of February to the Modesto address would have reached him. We cannot assume that mail directed by the local draft board during the month of February, but after the early days thereof, to the appellant at the Modesto address would have reached him. No mail was directed to him by the local draft board at the Modesto address at any time during the month of February 1955. In fact, no mail was directed to him at the Modesto address by the local board until September 1955, some six months later. In the letter of June 7, 1954, in which appellant advised the local draft board of the new Modesto address, he stated that his employer was the same as one previously reported to the draft board, "but [I] can be reached within one or two days at my San Diego address." The cover sheet of appellant's draft board file shows that appellant's address at the time that appellant furnished to the draft board the Modesto address was 650 Eleventh Street, San Diego, California. Therefore, when

mailed in February, because the Court has already instructed you that the area covered in the evidence, sometime between the first and the 21st, is close enough to the charge in the indictment and is a close enough time for the defendant's mailing the change of address card." (Tr. p. 518.)

[5] See United States v. Tramaglino, 197 F.2d 928, 932, cert. denied 344 U.S. 864. There the Court said: "Our decision in United States v. Wilson, 2 Cir., 154 F.2d 802, 805, requires only 'substantial similarity' between the indictment dates and those brought out in trial; all the versions here were within a few weeks of one another and of the indictment dates." In the Wilson case cited in Tramaglino, the indictment charged that a conversation material to the offense occured on or about July 20. The Court held that even if the conversation actually occurred on or around September 1, as defendant's analysis of the evidence indicated, the act proved was not too remote to support the indictment.

A variance between what is charged in the indictment and what is proved is not material or prejudicial unless it involves elements of surprise that would hamper defendant's efforts to prepare their defense. United States v. Ragen, 314 U.S. 513, 526.

the draft board received the letter, it had knowledge of that San Diego address. But that address was not *then* the address of the parents. No change in the parents' address had been given the board.

The record shows that the Modesto address was the sixth change of address which appellant furnished to his local draft board. The record further discloses many other communications from appellant to the draft board from the date of his registration to his last change of address, and several personal appearances before the board, all of which disclose his understanding of the duty placed upon him by law. The voluminous record before the draft board discloses that appellant was persistent and determined in his efforts to resist the I-A classification and to keep alive and exhaust his administrative remedies, up until February 1955. After that time he no longer complied with the law with which he was so familiar.

Appellant had a simple duty to perform--to keep his local draft board advised at all times where mail would reach him. This he failed to do. Two letters addressed to appellant at the last address he had given the board were never returned to the board, yet appellant claimed he had not received them. The postcard appellant says he mailed to the board was never delivered to it. While there is a conflict in the testimony, the jury had the right and did choose to believe appellant's failure to advise the draft board of his change of address was knowingly and wilfully done. The question of appellant's truthfulness and good faith was a question of fact for the jury's determination. The address given as that of appellant's parents, "where he could always be reached," was not accurate; no new address was given to the board, either by appellant or his parents, when the latter moved. That appellant had, on six previous occasions, advised the board of a change of address proves nothing that is of aid to appellant—it merely proves that he, with complete knowledge and understanding of his obligation and duty under a law (the provisions of

which were thoroughly familiar to him), knowingly violated that law for a period of eighteen months, from early June 1954 to the end of 1955. (Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3).) Appellant had a continuing duty during that eighteen month period to give the board accurate information as to where he could be reached.

To shift the blame for appellant's failure to follow the law to the board by claiming that but one of the three cover-sheets had the notation "(see letter attached)", and that therefore there was no proof appellant could not have been reached at such address because no letters were sent to the parents' address, is beside the point. The address so given was *not* the parents' address "at all times" during the eighteen months' failure by appellant to furnish his own address, nor "on or about February 1st, 1955." Appellant was not required by law to furnish his address to the local board only if that board might have letters it wanted to mail him —but *at all times.*

In the opinion of the jury, in which we join, this appellant had not met the test laid down in *Bartchy v. United States, supra,* that a registrant must "in good faith provide a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." In *Bartchy,* the registrant, a seaman, had relied on the regular procedure of his Maritime Union (procedures which had been effective in the cases of other registrants), but which there failed because of "a mistake of the official of the Union."

In *Ward v. United States,* 5 Cir., 1952, 195 F.2d 441, the appellate court refused to disturb the verdict of the jury convicting defendant. But there Ward had given to the local board, on its questionnaire, the address of his employer as well as his residence address. Ward moved from his residence address without notifying the board, relying on the business address which remained "good" and at which

Ward had proved he did receive mail. This business address the board did not attempt to use, despite Selective Service Regulations requiring them to do so. Section 1642.41.(b) of Selective Service Regulations. See note I of *Ward v. United States, supra.* The Supreme Court in a *per curiam* opinion without discussing the facts held the record did not support the charge "of a deliberate purpose to violate the law." Thus, the facts differ. (344 U.S. 924 (1935).)

Here the evidence is such that a trier of fact could well believe that no good faith existed on the part of Venus with respect to his continuing duty between June 7, 1954, and early 1956 to inform the board; and that he had knowingly and with deliberate purpose violated the law. That factual finding implicit in the jury's verdict is binding on this court, in the absence of error. We cannot hold the jury's verdict erroneous as a matter of law.

The judgment is *affirmed.*

JERTBERG, Circuit Judge (dissenting):

I am unable to agree with the conclusion reached in the majority opinion that the trial court did not err in failing to grant appellant's motion for judgment of acquittal made at the close of all of the evidence and renewed after the verdict of the jury. In *Bartchy v. United States,* 319 U.S. 484, the Supreme Court stated that the regulation which placed upon appellant the duty to keep his local draft board advised at all times of the address where mail would reach him "is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." The crucial period in this prosecution, as stated in the trial court's instructions to the jury, is the

month of February 1955. The letter of June 7, 1954, directed by the appellant to the draft board, and quoted in the majority opinion, stated that appellant's employer was the same one as the one previously reported to the draft board, and that appellant could be reached "within one or two days" at his San Diego address. The letter was enclosed in an envelope which bore the return address of 650 - 11th Street, San Diego, California, which appellant had previously furnished to the draft board. This address was also the address of appellant's parents, which had been furnished to the draft board long prior to June 7, 1954 as an address where appellant could always be reached. The clerk of the local draft board testified that the appellant had given his parents' address as the place where he could always be reached. The clerk further testified that the appellant was specifically requested not only to give the address where he lived or resided but also to give a reference of someone—his parents in this case—who would know his address or through whom mail would reach him. The clerk further testified that the return address on the outside of the envelope referred to the address of appellant's parents. In explaining why the notation "see letter attached" was made on the cover sheet of appellant's draft board file opposite appellant's Modesto address, the clerk stated "I made that entry for the simple reason that if any mail were returned to us from the Modesto address that I would look for and try and contact him through his San Diego address." No notices were sent by the local draft board to the appellant at either the Modesto or the San Diego address during the month of February 1955. The record is likewise clear that no effort was made by the draft board at any time to contact appellant's parents or his employer. In fact, no mail was directed by the local draft board to the appellant until September 1955. It is undisputed that appellant's parents remained at 650 - 11th Street, San Diego, California, until the middle of February 1955, at which time they moved to 1120 - 30th Street, San Diego, at

which time they furnished to the San Diego Post Office the latter address as the place where mail should be forwarded. It appears clear to me that notice directed to the appellant at 650 - 11th Street, San Diego, California, during the month of February 1955 would have come into the hands of the appellant, notwithstanding the fact that appellant's parents moved to a new address about the middle of February. Also, in my view, it is pure speculation to assume that mail directed to the appellant at the Modesto address during the month of February 1955 would not have come into the hands of the appellant.

I am convinced that the evidence in this case meets the test laid down in *Bartchy*, and that appellant, in good faith, provided a chain of forwarding addresses by which mail sent to the address which appellant furnished the board could be by the appellant reasonably expected to come into his hands in time for compliance. I would reverse the judgment of conviction.

APPENDIX B

Judgment of Court of Appeals

Appeal from the United States District Court for the Southern District of California, Southern Division.

This cause came on the be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this case be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered: December 24, 1960
FRANK H. SCHMID, Clerk

APPENDIX C

Order of Court of Appeals on Petition for Rehearing

Before: BARNES and JERTBERG, Circuit Judges, and BOLDT, District Judge

For the reasons set forth in the majority opinion, the petition for rehearing is denied. The suggestion for a rehearing en banc is rejected.

STANLEY N. BARNES
Circuit Judge

I concur:

GEORGE H. BOLDT
District Judge

I dissent, and vote to grant the petition for rehearing for the reasons set forth in my dissenting opinion. I reject the suggestion that a rehearing en banc be had.

GILBERT H. JERTBERG
Circuit Judge

[February 2, 1961]

APPENDIX D

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 3, 1961.

(S) W. O. DOUGLAS
Associate Justice of the
Supreme Court of the United States

Dated this 23rd
day of February, 1961.